SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 166

J. HOWARD JOHNSON, AS RECEIVER OF ALL THE RENTS AND PROFITS ISSUING OUT OF PREMISES SITUATED ON THE NORTHEASTERLY CORNER OF GREEN AND BEAVER STREETS, IN THE CITY OF ALBANY, NEW YORK, AND WALLACE J. ALLENDORF,

Petitioners,

vs.

JOHN M. SMITH, COUNTY TREASURER OF THE COUNTY OF ALBANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, ALBANY COUNTY, AND BRIEF IN SUPPORT THEREOF.

ROLAND FORD,
HAROLD J. HINMAN,
C. RAYMOND BURTON,
ELLIS J. STALEY, JR.,
JOHN F. LUCEY,
Counsel for Petitioners.

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J. HOWARD JOHNSON, AS RECEIVER OF ALL THE RENTS AND PROFITS ISSUING OUT OF PREMISES SITUATED ON THE NORTHEASTERLY CORNER OF GREEN AND BEAVER STREETS, IN THE CITY OF ALBANY, NEW YORK, AND WALLACE J. ALLENDORF,

Petitioners,

vs.

JOHN M. SMITH, COUNTY TREASURER OF THE COUNTY OF ALBANY; YETTA V. SANDLER, JOHN CARROLL, L. BERMAN, NEW YORK STATE LIQUIDATING CORP., FEDERAL INVESTORS, INC., "JOHN DOE" AND "MARY ROE", SAID LAST TWO NAMES BEING FICTITIOUS, BEING ALL TENANTS, OCCUPANTS AND CLAIMANTS UNDER ANY OF THE TAX SALES DESCRIBED IN THE COMPLAINT WHOSE NAMES ARE UNKNOWN TO THE PLAINTIFFS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

To the Honorable the Supreme Court of the United States:

The petition of J. Howard Johnson, the Receiver of all the rents and profits issuing out of the premises situated on

the northwest corner of Green and Beaver Streets, City of Albany, N. Y., and Wallace J. Allendorf and John F. Lucey, Special Guardian for Eva Kimball Turnbull, et al., respectfully shows:

1. This is an action to set aside various tax sales made by the County Treasurer of the County of Albany and declaring the same to be null and void, and requiring the purchasers on said sales to account for the rents collected since said purchasers went into possession. The tax sales in question were made during a period when petitioner J. Howard Johnson, as Receiver in a partition action, was in possession of the premises in question.

This petition seeks to review the decision of the Court of Appeals of the State of New York holding that although the property was in *custodia legis* at the time of the assessment of the taxes in question and the sales thereof, said sales were legal and valid.

2. Petitioners presented a question that due to the separation of the powers of Government, the property in question having been seized by the judicial power, could not be interfered with by another branch of the Government under this fundamental doctrine, which was discussed at length in Matter of Tyler 149 U. S. 191.

Jurisdiction and Timeliness

3. This petition for certiorari is made under 28 U. S. C. A. § 344, subd. (b), and § 350, and the Court has jurisdiction to grant the writ. *Department of Banking* v. *Pink*, 317 U. S. 264 (1942).

4. The decision of the Court of Appeals was handed down January 16, 1948. On the 16th of January, 1948, the remittitur was issued by that Court reversing the order of the App. Div. and affirming the order of the Special Term of

the Supreme Court, State of New York, dismissing the complaint; on February 8, 1948, a motion was made in the Court of Appeals on behalf of the defendants, YETTA V. SANDLER, JOHN CARROLL, and L. BERMAN to include these three defendants as appellants in the Court of Appeals; that it was claimed that Yetta V. Sandler, John Carroll, and L. Berman had joined in a motion before the Appellate Division of the Supreme Court, State of New York, for leave to appeal to the Court of Appeals, but that the order granting leave to appeal did not include said three defendants; that said three defendants did actually serve a notice of appeal. The Court of Appeals on March 18, 1948, denied said motion, without prejudice to a further application, providing the Appelate Division resettle that Court's order granting permissing to appeal to the Court of Appeals. On March 22, 1948, such a motion was made in the Appellate Division of the Supreme Court of the State of New York, and on the 31st day of March, 1948, the order permitting said three defendants to appeal to the Court of Appeals was amended and resettled *nunc pro tunc* permitting such appeal. On April 1, 1948, a motion was then made in the Court of Appeals to amend the remittitur issued by that Court so as to include said three defendants, and on April 22, 1948, the Court of Appeals granted said motion and amended the remittitur issued by that Court so as to include said three defendants, YETTA V. SANDLER, JOHN CARROLL and L. BERMAN, as appellants on appeal to said Court, and MAURICE FREEDMAN, as counsel for said appellants, and the Supreme Court, Albany County, was requested to direct its Clerk to return said remittitur to the Court of Appeals for amendment accordingly, and that said remittitur was amended accordingly April 22d, 1948, and the same is now on file with the Clerk of the Appellate Division of the Supreme Court, Third Department, at Albany, N. Y. Thereupon,

on April 22, 1948, the said remittitur became the final order of the Court of Appeals adjudicating the rights of all the parties to this action.

Opinions Below

5. The opinion of the Appellate Division of the Supreme Court, Third Department was reported in 272 App. Div. 6. The opinion of the Court of Appeals was reported in 297 N. Y. 165.

Summary Statement of the Matter Involved

6. An action of partition was commenced in November, 1925 for the partition of premises known as 20-24 Green Street, Albany, N. Y. Judgment of partition and sale was entered December 3, 1927. There were upwards of 50 parties to the action. Various phases of the case have been reported as follows: *Stock* v. *Mann,* 129 Misc. 201; 132 Misc. 474; 229 App. Div. 19; 255 N. Y. 100, reargument denied, 256 N. Y. 545; 254 N. Y. 507.

George W. McEwan was appointed receiver of the property March 2, 1935. He was succeeded by J. Howard Johnson, plaintiff, who was appointed and qualified as receiver February 3, 1940. The property in question was assessed for taxes and water rents in 1938 and 1939. These taxes and water rents were returned to the County Treasurer and the property was sold by him at tax sales. The County of Albany purchased the property and assigned its right to Federal Investors, Inc. The property was sold for about Five Thousand Five Hundred ($5,500.00) Dollars, and was assessed for Fifty-Two Thousand ($52,000.00) Dollars, later reduced to Forty Thousand ($40,000.00) Dollars. This action was brought by the receiver in partition and by one of the parties to the partition action to set aside these tax sales and conveyances pursuant to such

sales and to compel an accounting of the rents collected by the purchasers.

The action is based on the proposition that the property subject to the partition action was in *custodia legis* through the receiver, and that a sale thereof during such custody was void; that the property was seized by the court through its receiver, who took charge of it, collected the rents and profits, and that the court in so seizing the property and not itself providing for the payment of taxes, as has been customary in those matters from time immemorial, has taken the property of the parties to the partition action, some of whom were infants, without due process of law, and has not accorded to the said parties equal protection of the laws, and that the action of the court in the premises did not preserve, for the benefit of the parties, a separation of the powers of Government.

Question Presented

7. The following question is presented in this case: Were the tax sales in question void, the property being at the time in *custodia legis,* and does the complaint in this action state a cause of action?

Assignment of Errors

8. It is submitted that the Court of Appeals erred:

(a) In holding that the property in question, although in *custodia legis* through a receiver, was properly sold for taxes without the permission of the Court.

(b) In holding that the complaint in this action did not state a cause of action.

(c) In holding that, under the Tax Law of the State of New York, a County Treasurer is directed in mandatory terms to sell real property for unpaid taxes, and that there

is no statutory provision exempting property in the hands of a receiver from the operation of the provisions of the Tax Law, such statutory provision being necessary to permit such exemption.

(d) In holding that since it is not jurisdictional to sue a receiver without leave of the court, the sale of property in custody of a receiver, without leave of the court, is likewise not jurisdictional.

(e) In holding that there was no encroachment by the taxing officer on the judicial department, and that separation of the powers of government was not involved.

Reasons for Allowance of the Writ

9. The reasons relied on by petitioners for allowance of the writ are as follows:

(a) To permit the taxing officer to seize and sell property in *custodia legis* denies to those interested in the property equal protection of the laws, and deprives them of property without due process of law.

(b) The result of the decision in this case is to ignore the maintenance of the system of checks and balances characteristic of republican institutions, which requires that the judicial branch shall not be invaded or encroached upon.

(c) The result of said decision is to permit a piece of property worth at least $40,000 to be acquired for about $5,500 by a court which has seized the property, and deprived the parties interested in the property from collecting its rents and profits, and rendered them helpless and refusing to protect infants interested the wards of the court.

WHEREFORE, petitioners pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the Supreme Court of the State of New York in

and for the County of Albany commanding that Court to certify and send to this Court on a certain day to be therein designated a full and complete transcript of the record and all proceedings of the said Court in this cause to the end that the case may be reviewed and determined in this Court as provided in 28 U. S. C. A. § 344 (b); and that the final order and judgment of the said Court and every thereof may be reviewed and corrected by this Court in conformity with the Constitution and Laws of the United States; and that said final judgment may be reversed and the determination of the Appellate Division of the Supreme Court be confirmed; and petitioners pray for such other and further relief as to this Court may seem just and proper, and the petitioners will ever pray.

ROLAND FORD,
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C. RAYMOND BURTON,
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JOHN F. LUCEY,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 166

J. HOWARD JOHNSON, as Receiver of all the Rents and Profits Issuing Out of Premises Situated on the Northeasterly Corner of Green and Beaver Streets, in the City of Albany, New York, and WALLACE J. ALLENDORF,

Petitioners,

vs.

JOHN M. SMITH, County Treasurer of the County of Albany, YETTA V. SANDLER, JOHN CARROLL, L. BERMAN, NEW YORK STATE REALTY LIQUIDATING CORP., FEDERAL INVESTORS, INC., "JOHN DOE" and "MARY ROE", Said Last Two Names Being Fictitious, Being All Tenants, Occupants and Claimants Under Any of the Tax Sales Described in the Complaint, Whose Names Are Unknown to the Plaintiffs.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement of the Case

This action was brought by a receiver in partition, together with one of the numerous parties interested in the

property which is the subject of the partition action, on behalf of himself and all others similarly situated, to set aside tax sales of the said property and conveyances pursuant to such sales, and to compel an accounting of rents collected by the purchasers at said sales and by their assignees.

This action was authorized by the Court (fol. 82).

The action is based on the proposition that the property subject to the partition action was in the custody of the court through its receiver, and that a sale thereof during such custody was void.

The Original Partition Action

The action in partition was commenced November 17, 1925 (fol. 78). The property in question is known as 20-24 Green Street, Albany, New York (fol. 83).

Judgment of partition and sale was entered December 3, 1927. There are upwards of fifty parties to the action (fols. 79-109).

Various phases of the case have been reported as follows: *Stock* v. *Mann*, 129 Misc. 201; 132 Misc. 474; 229 App. Div. 19; 255 N. Y. 100, reargument denied, 256 N. Y. 545; 254 N. Y. 507.

A notice of pendency was recorded May 13, 1929 (fol. 115).

On March 2, 1935, George W. McEwan was duly appointed receiver. He was succeeded by J. Howard Johnson, who was appointed and qualified as receiver, February 23, 1940 (fols. 80, 116).

The property in question was assessed in the Albany Tax District December 29, 1938, for taxes and water rents (fols. 86, 90), and was also assessed on December 29, 1939, for taxes and water rents (fols. 95, 98).

These taxes and water rents were returned to the County Treasurer and the property was sold by him at tax sales as follows:

1938 Assessment. Sold Sept. 1940 to the County of Albany for $2,223.52. 1000 years (fol. 92).

1939 Assessment. Sold Sept. 1941 to the County of Albany for $2,227.27. 1000 years (fol. 101).

The County of Albany assigned its rights under said sales to Federal Investors, Inc. (fols. 93, 101), who later received conveyances (fols. 93, 101).

Federal Investors, Inc., sold to New York State Realty Liquidating Corp., which, in turn, sold to Yetta V. Sandler, who is now collecting the rents (fol. 105).

Notices were served on the occupants. These notices, with proof of service, appear in full on pp. 55-62.

The tax deeds have not been recorded (fol. 119).

The property in question was also sold to the County of Albany in 1942 and 1944 (fol. 119).

The receivers in the partition action had power and authority to take possession of the property in question, receive the rents and profits and lease the same (fols. 116, 143-153).

J. Howard Johnson took possession under his appointment as receiver in February, 1940 (fol. 82). The sales by the County were held in September, 1940 and 1941.

The properties were assessed for $40,000 (reduced value) and $52,000 (fols. 87, 95).

As stated above, they were sold for about $5,500 for the assessments of 1938 and 1939.

Yetta V. Sandler, the present owner of the rights under the tax deeds of 1940 and 1941 sales, is a tenant for years in the premises (fol. 103).

Jurisdictional Statement and Assignment of Errors

The Court will find these respectively in paragraphs 3, 4 and 8 of the petition herein.

Point I

Property in a receiver's hands is not subject to seizure for taxes. It is in the custody of the Court. The maintenance of the system of checks and balances characteristic of republican institutions requires that the judicial branch shall not be invaded or encroached upon. The Court itself will enforce the lien of the tax.

In *re Tyler*, 149 U. S. 164, it appeared that petitioner was a sheriff. He applied for writ of habeas corpus claiming he was unjustly detained by a United States marshal.

A railroad company went into the hands of a receiver, and all its property was placed under the receiver's care and management and protected by injunction.

The receiver filed a bill in equity in the United States District Court against the treasurers and sheriffs of the counties through which the railroad was maintained. He alleged that the treasurers were about to issue tax executions, and the sheriffs about to levy and seize thereunder, property of the railroad. The bill alleged that the taxes were void, and that portion of the same which were valid, had been tendered and refused. The court issued an injunction *pendente lite* forbidding the collection of any taxes not admitted to be due.

Thereafter new taxes accrued, and again the receiver tendered the taxes admitted to be due. These amounts were received but thereupon, warrants were issued by the county treasurers for the additional taxes claimed to be due, and property of the railroad was seized. Again the sheriff was enjoined, and he was cited for and held in contempt. He then applied for a writ of habeas corpus. On this application the Court said:

> "The general doctrine that property in the possession of a receiver appointed by a court is in *custodia*

legis, and that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, but this does not justify a physical invasion of such custody and a wanton disregard of the orders of the court in respect of it. The maintenance of the system of checks and balances characteristic of republican institutions requires the coordinate departments of government, whether federal or state, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle.

"This levy of a tax warrant, like the levy of an ordinary *fieri facias*, sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

As the Court pointed out in its opinion, the rule in question does not have the effect of withdrawing the property assessed from taxation, or change the paramount nature of the tax. It simply withdraws the property from the custody of the owner and places it in custody of the Court so it is no longer subject to sale by the ordinary tax processes as it is already sequestered and subject to sale by

the Court for the purpose. In a suit such as this one, the parties are helpless. The Court taking custody of the property should protect everyone interested, including the taxing authorities.

In our form of government with its separation of powers and departments, that separation should be jealously guarded. We fail, ordinarily, to appreciate its salutary effects, until they are in some measure ignored, as they must be in the case of war.

The separation of the powers and departments of government is a reciprocal proposition. On the one hand the Executive Department respects the Judiciary when the latter takes custody of property to be administered for the benefit of all of the parties.

On the other hand the Judiciary respects the Executive Department, so that it can perform its functions.

A number of the cases which have to do with the "Secrets of State" are reviewed in *Worthington* v. *Scribner*, 109 Mass. 48.

The situation here is that over 20 years ago this action of partition was commenced and in the course of the proceedings receivers have been appointed. These receivers took charge of the property, collected the rents and profits and divested the parties of all control over the premises which were the subject of the action. Some of the parties are infants with special guardians. The result has been that one branch of the Government has seized the property from the citizens, rendered them helpless and failed to give them the protection which should be afforded them by the judiciary.

From time immemorial courts in connection with their equitable jurisdiction have sequestered property belonging to litigants.

Angel v. *Smith*, 9 Ves. Jun. Repts. 335.

Daniell's Ch. Pr. (8th ed.), p. 801.

What is due process and equal protection of the law may be ascertained by an examination of those settled usages and modes of proceedings existing in the law of England before the emigration of our ancestors, and shown not to have been unsuited to our civil and political condition by having been acted on after the settlement of this country. A process of law must be taken to be due process if it can show the sanction of settled usage both in England and this country. *Twining* v. *New Jersey*, 211 U. S. 78, 100. *Butler* v. *Perry*, 240 U. S. 328, 333.

While it is true that no one has a vested right in a rule of the common law, it is also true that the legislative power of a state can only be exercised in subordination to the fundamental principle of right and justice which is guaranteed by the Fourteenth Amendment. The seizure of a citizen's property, divesting him of its use and income, by one arm of the Government whereby another arm of the Government is permitted to seize that property and dispose of it, is a wrongful and injurious invasion of property rights. *Truax* v. *Corrigan*, 257 U. S. 311, 329.

It was suggested by the Court of Appeals that the commencement of an action against a receiver without leave of the Court is not jurisdictional.

No doubt that rule was correct.

Where a receiver has been appointed by the Court and an action against that receiver has been brought in Court, the Court itself is in a position to forgive or punish the interference with its rights. In such case, the Court has control of the action and may stop it or set it aside.

The distinction was noted and discussed in *Preston* v. *Loughran*, 58 Hun (N. Y.) 210, 215.

The case is different where an executive department in an extra-judicial proceeding invades the province of the Court. On a tax sale there is no action pending in Court

in the tax proceedings, and therefore the case is different from the one where a receiver appointed by the Court is sued in another proceeding in Court. In the case of the Tax sale there is no proceeding pending in court. It is simply an extra-judicial proceeding carried on by the executive department.

POINT II

Petitioners' application for a writ of certiorari should be granted, and this Court should review the decision of the Court of Appeals and finally reverse it.

Respectfully submitted,

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